Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Digital Output Protection Technologies and Recording Methods Certifications	)	**MB Docket No. 04-63**
TiVoGuard Digital Output Protection Technology	)	

OPPOSITION OF CONSUMER GROUPS TO THE PETITION FOR PARTIAL RECONSIDERATION AND CLARIFICATION BY THE MOTION PICTURE ASSOCIATION OF AMERICA, INC., ET AL.

Public Knowledge and Consumers Union (hereafter "the Consumer Groups") hereby submit this Opposition to the Petition for Partial Reconsideration and Clarification ("Petition") filed by the Motion Picture Association of America, Inc. ("MPAA"), Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLP, The Walt Disney Company, and Warner Bros. Entertainment Inc. (collectively, "the MPAA Petitioners") in response to the Federal Communications Commission's August

12, 2004, approval of TiVo's digital output protection technology for use in covered demodulator products.[1]

INTRODUCTION AND SUMMARY

The MPAA Parties are challenging the Commission's approval of TiVo's TiVoGuard protection technology on the expressed theory that this approval was "premature" and that it must not occur prior to the resolution of issues raised in the Further Notice of Proposed Rulemaking of the Broadcast Flag proceeding. The actual arguments advanced in their petition, however, make clear that the MPAA Petitioners are actively hostile to any protection technology that allows for remote viewing of recorded television content. For this reason alone, their arguments that the TiVo submission is "vague" or "premature" should be taken with a grain of salt.

Moreover, the scenarios the MPAA Petitioners offer as to possible circumvention of TiVo's protection technology fall outside the range of issues that the Commission has attempted to address in its broadcast-flag-related proceedings. The Commission has made clear that its regulation is intended only to be a "speed bump" on the road to "indiscriminate redistribution" of captured television content — ***it has never been the Commission's goal to require absolute security of broadcast content in the face of any unauthorized copying or retransmission of broadcast content, regardless of whether that unauthorized copying or retransmission amounts to "indiscriminate redistribution."***

[1] *In the Matter of Digital Output Protection Technology and Recording Method Certifications, Order,* MB Docket Nos. 04-55, et al., FCC 04-193 (rel. Aug. 12, 2004) ("Certification Order").

The MPAA Petitioners have also requested that the Commission allow the MPAA Petitioners to use their market power to negotiate any changes to protection schemes outside the supervision of the Commission. While we remain skeptical of the broadcast-flag-based regulatory regime set up by the Commission, we believe that so long as this scheme is in place, it would be inappropriate for the Commission to surrender supervision of the evolution of protection schemes, which otherwise may easily be diverted or distorted by the MPAA Parties' power to command technological concessions from platform makers and other technology providers.

The Consumer Groups are filing in this matter because a vibrant marketplace competes not only on price, but also on features and innovation. The Commission established a series of guidelines approved technologies must follow, and the Commission has decided that TiVo's protection technology follows those rules. Just because MPAA objects to some additional features of TiVo's protection technology does not mean that the technology fails to protect their content from indiscriminate redistribution over networks such as the Internet.

I. THE MPAA PARTIES ARE UNALTERABLY OPPOSED TO REMOTE VIEWING CAPABILITY, AND WILL REMAIN SO REGARDLESS OF ANY EFFORTS TO "CLARIFY" TIVO'S PROTECTION TECHNOLOGY.

Although the MPAA Parties make a show of pretending that their problem with TiVo lies in inadequate specificity and other purported problems in the record prior to the approval of TiVoGuard, they tip their hand on page 11 of their petition when they make clear that, even if TiVo had demonstrated superhuman specificity, etc., in their filing, the MPAA Parties would oppose certification of TiVoGuard because of its lack of

"proximity controls." As is their habit, the MPAA Parties argue that, if their demands are not met, the future of broadcast television as we know it is at stake:

> [T]he Commission's decision is inconsistent with the Commission's stated goal of preserving the viability of over-the-air broadcast television. As the MPAA Parties argued in response to the TiVoGuard and SmartRight applications for certification, the broadcasting business in the United States is based on the notion of proximity control, in the form of a television station's transmitter footprint. Syndication, program licensing, local advertising, and sports blackouts are all premised on broadcast television being [sic] limited to a particular geographic area. The Commission has recognized the importance of proximity control in the past in addressing distant signals and syndicated exclusivity. In approving technologies to redistribute content based on hypothetical restrictions, the Commission has unnecessarily undertaken a serious risk that may threaten the viability of the very broadcast system the Commission is endeavoring to protect.[2]

In short, the MPAA Parties are asserting that even if the Commission and TiVo were to jump through every conceivable hoop in spelling out the specifics of TiVoGuard, the MPAA Parties would nonetheless be opposed to the remote-viewing functionality that is central to TiVo's plans to remain competitive in the PVR marketplace.

Had the Commission been silent on the issue of proximity controls, the MPAA Parties might plausibly have argued that the Commission had not fully considered whether proximity controls ought to be a requirement of any protection scheme. As it happens, the Commission has expressly stated in its Certification Order that "we are not inclined as part of our review of these certifications to impose proximity controls as an additional obligation where other reasonable constraints sufficiently limit the redistribution of content."[3]

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[2] Petition at 11.
[3] Certification Order at para. 72.

The Commission thus made clear that its mission with the broadcast-flag regulation is merely to prevent the kind of indiscriminate redistribution it believes will someday be a threat to digital broadcast television, and not to attempt to fix the world of digital broadcast television so that it would mimic the contours of broadcast television as it was decades ago. Despite the Consumer Groups' ongoing criticisms of the broadcast-flag regulation, we believe the Commission's intention to limit the scope of what it hoped to accomplish with this regulation was the right intention.

II. THE UNAUTHORIZED-USE SCENARIOS CONJURED BY THE MPAA PARTIES FALL OUTSIDE THE SCOPE OF ANY REGULATION AIMED AT "INDISCRIMINATE REDISTRIBUTION."

In its Report and Order and Further Notice of Proposed Rulemaking in the broadcast-flag proceeding, the Commission made clear that its "immediate concern is to adopt and begin implementation of a content protection scheme that will prevent the unfettered dissemination of digital broadcast content through means such as the Internet."[4] The MPAA Parties go to great lengths to outline scenarios in which device "dongles" and serial numbers are shared among purported "total strangers," and in which devices are routinely unhitched from one home-entertainment system to another associated with a different "secure viewing group." We leave it to TiVo to explain the extent to which these scenarios are unlikely; our argument here is that even if these scenarios were likely, they do not add up to "indiscriminate redistribution" or "unfettered dissemination" of digital broadcast content.

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[4] *Digital Broadcast Content Protection, Report and Order and Further Noticed of Proposed Rulemaking,* 18 FCC Rcd 23550, para. 10 (Nov. 4, 2003).

Indeed, the very fact that a user has to jump through any number of technical hoops to effectuate the scenarios is proof that any resulting dissemination of digital content is "fettered." Even if we assumed that there is some percentage of the viewing population that is willing to swap "dongles" with a "total stranger," there is no doubt that this requirement, as a prerequisite for moving protected content among machines or affinity groups, is just the kind of "speed bump" the Commission had in mind when stated that the purpose of the broadcast-flag regulation was to set up "a 'speed bump' mechanism to prevent indiscriminate redistribution of broadcast content."[5] Even if we assume that someday there will be swap meets of "total strangers" who want to trade their device "dongles," the very need for such a swap meet to occur before unauthorized retransmission even becomes possible suggests that the "speed bump" requirement has been met.

In the final analysis, not every scenario in which unauthorized copying might occur adds up to "indiscriminate redistribution." The Commission has sought to steer clear of enforcing copyright law as a whole through its broadcast-flag regulation and has also expressed its intention not to alter the contours of copyright law. Even if we assume that the "total strangers" the MPAA Parties conjure up for their dongle swap meet are engaging in copyright infringement, it does not follow that this concern about possible infringement falls within the scope of the Commission's broadcast-flag regulation, which, after all, is not designed to be an anti-infringement regulation.

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[5] *See* Broadcast Protection Order at para. 14.

IV. THE COMMISSION SHOULD MAINTAIN THE REQUIREMENT OF PRIOR COMMISSION APPROVAL OF TECHNOLOGY CHANGES REGARDLESS OF PRIVATE CONTENT PARTICIPANT AGREEMENTS.

The history of the broadcast-flag proceeding has been one in which the MPAA Parties consistently have striven to obtain as much design control over platform technologies as possible. The MPAA Parties' original proposals, for example, put studios in a gatekeeper role with regard to technology approvals. Now what the MPAA Parties are asking for is a ticket to opt out of the Commission supervision if they obtain a deal more to their liking through private negotiations with technology makers.

The Consumer Groups remind the Commission that the purported goal of the broadcast-flag regulation has never been to please the MPAA Parties, but to promote the transition to digital television. It follows, then, that giving the MPAA Parties the scope to negotiate without Commission supervision the contours of content-protection technologies would be inconsistent with the broadcast-flag regulation, since such a negotiated framework might ultimately hurt the transition to digital television rather than help it (*e.g.,* by limiting consumer uses in such a way as to discourage consumer uptake of digital television products and content). The Commission has taken upon itself the prerogative to regulate content-protection schemes in this area; so long as it retains that prerogative, it also must obey the obligation to prevent private agreements from pre-empting its regulatory goals. While the Consumer Groups continue to question the wisdom of the Commission's decision to impose this regulatory framework, we also believe the Commission would do worse if it provided only half a framework — one in which the MPAA Parties had rights only, rather than rights and accompanying duties.

The duty here must be for the MPAA Parties and others to demonstrate how their proposed agreements serve the DTV transition, and consumers and public policy generally.

CONCLUSION

The Consumer Groups argue here in defense of the TiVoGuard certification not because we necessarily favor TiVo's technology in particular, but because of the larger general principle that consumers benefit in the long run when products and services compete in feature offerings as well as in price. With regard to digital broadcast television, we continue to believe that such competition would naturally have occurred in the absence of the Commission's broadcast-flag regulation; in the context of the Commission's decision to regulate, however, we believe the Commission must be proactive in preserving competition, both by ensuring diversity among product offerings, and by preventing stakeholders with market power from acting anti-competitively. The Commission was correct within the broadcast-flag regulatory framework to approve TiVoGuard, and should resist entreaties to retract or alter its approval.

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